Public Prosecutor v Kanadasan a/l Sankaran & Anor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–80 OF 2006
TENGKU BAHARUDIN SHAH, KN SEGARA AND SULONG MATJERAIE JJCA
2 OCTOBER 2009

Criminal Procedure — Appeal — Appeal against sentence — Conviction under s 304(a) of the Penal Code — Whether sentence manifestly inadequate — Whether plea of guilt made too late in trial — Whether attack on deceased unprovoked and premeditated — Whether atrocious injuries inflicted on deceased

Criminal Procedure — Plea of guilt — Mitigating factor — Whether automatic discount in sentence warranted — Whether mitigating effect of plea of guilt made too late in trial

The respondents were originally charged under s 302 of the Penal Code ('Code') for the murder of a 19 year old teenager who was killed in his sleep in his own home. Subsequently, the prosecution offered an alternative charge under s 304(a) of the Code. The respondents pleaded guilty and were sentenced to ten years imprisonment with effect from their respective dates of arrest. The prosecution appealed against the sentence as being manifestly inadequate.

Held, allowing the appeal:

(1) There was no plea of guilt made by the respondents on the first available opportunity. The dilatory attitude of the respondents did not contribute to the expeditious disposal of the case. If a plea of guilt is made too late in the trial it may cease to have mitigating effect (see paras 29 & 36).

(2) The deceased was sleeping when the respondents caused the fatal injuries to him. The deceased was helpless and was not able to put up any defence to the vicious attacks by the respondents. There was no provocation or retaliation at the time of the commission of the offence. The act of the respondents coming into the deceased's home to cause injuries early in the morning while everyone was asleep was completely unprovoked and premeditated. The injuries inflicted on the deceased's

head, chin and neck were atrocious. Clearly the respondents intended to cause the death of the deceased. It was savage and barbarous. This was an occasion when the Court of Appeal was compelled to intervene. Society must be protected from these rancorous men. Public interest required intervention (see paras 38–40).

(3) There is no automatic rule that an offender will be given 1/3 discount upon pleading guilty. Courts must consider the facts of each particular case before sentencing (see para 45).

(4) The sentence of 10 years imprisonment was set aside and substituted with a sentence of 17 years from the dates of the respective arrests of the two respondents (see para 50)

[Bahasa Malaysia summary

Responden-responden pada asalnya dituduh di bawah s 302 Kanun Keseksaan ('Kanun') bagi pembunuhan seorang remaja berumur 19 tahun yang dibunuh dalam tidurnya di rumahnya sendiri. Kemudiannya, pihak pendakwaan menawarkan satu tuduhan alternatif di bawah s 304(a) Kanun tersebut. Responden-responden mengaku bersalah dan telah dihukum 10 tahun penjara bermula dari tarikh mereka masing-masing ditahan. Pihak pendakwa merayu terhadap hukuman kerana ianya adalah ternyata tidak memadai.

Diputuskan, membenarkan rayuan:

(1) Tidak ada pengakuan bersalah yang dibuat oleh responden-responden pada peluang pertama yang mereka didapati. Sikap berlengah-lengah responden-responden tidak menyumbang untuk kes dilupuskan cepat. Jika pengakuan bersalah dibuat terlalu lambat dalam perbicaraan ia mungkin tidak mempunyai efek mitigasi (lihat perenggan 29 & 36).

(2) Si mati sedang tidur apabila responden-responden menyebabkan kecederaan yang membawa maut kepadanya. Si mati tidak berdaya dan tidak dapat mempertahankan dirinya terhadap serangan-serangan ganas responden-responden. Tidak ada provokasi atau tindakan balas pada masa kesalahan dilakukan. Perbuatan responden-responden yang masuk ke rumah si mati bagi menyebabkan kecederaan pada awal pagi semasa semua orang sedang tidur tidak dibangkitkan oleh kemarahan dan telah dirancang. Kecederaan ke kepala, dagu dan leher si mati adalah kejam. Adalah jelas responden-responden berniat untuk menyebabkan kematian si mati. Ia adalah ganas dan kejam. Ini adalah satu peristiwa di mana Mahkamah Rayuan dipaksa untuk campur tangan. Masyarakat

mesti dilindungi daripada lelaki-lelaki yang penuh rasa dendam ini. Demi kepentingan awam memerlukan mahkamah ini campur tangan (lihat perenggan 38–40).

(3) Tidak ada peraturan automatik bahawa seorang pesalah akan diberikan 1/3 diskaun apabila mengaku bersalah. Mahkamah-mahkamah mesti mempertimbangkan fakta-fakta dalam setiap kes sebelum menjatuhkan hukuman (lihat perenggan 45).

(4) Hukuman 10 tahun penjara diketepikan dan digantikan dengan hukuman 17 tahun bermula dari tarikh penangkapan kedua-dua responden masing-masing (lihat perenggan 50).]

Notes

For cases on appeal against sentence, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 179–183.

For cases on mitigating factor, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2634–2635.

Cases referred to

Bachik bin Abdul Rahman v PP [2004] 2 MLJ 534; [2004] 2 CLJ 572, CA (folld)

Pendakwa Raya lwn Ooi Kwang Lai [2000] 6 MLJ 622, HC (refd)

PP v Dato' Nallakaruppan Solaimalai [1999] 2 CLJ 596, HC (refd)

PP v Dato' Waad bin Mansor [2005] 2 MLJ 101, FC (refd)

PP v Gunasekaran a/l Arjunan & Anor [2006] 5 MLJ 527, HC (folld)

R v Sargeant (1974) 60 Cr App R 74 (refd)

Vinaga Moorthy a/l Gopal v PP [2003] 2 MLJ 87, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 20

Penal Code ss 34, 302, 304(a)

Mangaiarkarasi a/p Krishnan (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

SS Seelan (M Sathia & Associates) for the respondents.

Sulong Matjeraie JCA (delivering judgment of the court):

[1] This is the judgment of the court.

[2] At an appeal hearing before us, we unanimously agreed with the learned deputy public prosecutor, Puan Mangaiarkarasi a/p Krishnan that the ten years imprisonment imposed by the learned judicial commissioner at Shah Alam on the two respondents who had been jointly charged under s 304(a)

of the Penal Code read together with s 34 of the same Code was manifestly inadequate. This horrific homicide case resulted in the death of a 19 year old teenager who was killed in his sleep. We set aside the sentence imposed and in place substituted the sentence of 17 years imprisonment. We now give our reasons for our decision.

BACKGROUND

[3] The appellant, the public prosecutor, is appealing against the sentence imposed by the High Court at Shah Alam on 18 May 2006 on both the respondents. The grounds argued may broadly be divided into the following categories:

(a) the learned judicial commissioner erred in not giving due consideration to the seriousness of the injuries inflicted and the circumstances in which the death was caused;

(b) whether 'discount' is an automatic rule when the respondents plead guilty; and

(c) trend of sentencing in similar cases and sentence imposed is manifestly inadequate. These will be discussed at the later stage.

[4] The respondents were originally charged under s 302 of the Penal Code. The penalty for an offence under s 302 of the Penal Code is a mandatory death sentence. *Trial commenced on 27 September 2004. The respondents claimed trial.* The prosecution called five witnesses to testify against the respondents.

[5] After some turn of events and almost 1 1/2 years later, learned counsel for the respondents told the court on *7 February 2006* that their representation for the reduction of charge was allowed by the attorney general's chambers. *However they needed time to consider the offer!*

[6] *On 16 February 2006*, learned counsel for the respondents told the court *that they intend to proceed with the trial and hearing dates for the continued trial were fixed.*

[7] *On 17 May 2006*, the prosecution offered an alternative charge under s 304(a) of the Penal Code. This was some one year and eight months after the commencement of the trial.

[8] The respondents pleaded guilty and were sentenced to ten years imprisonment with effect from their respective dates of arrest.

FACTS OF THE CASE

[9] The case for the prosecution was that both respondents were charged initially under s 302 of the Penal Code. The trial commenced on 27 September 2004 and five witnesses have testified against the respondents. The respondents made representation to the attorney general for the reduction of the charge and told the court that this was allowed on 7 February 2006. However, the respondents needed time to consider the offer.

[10] The respondents were later 'offered an alternative charge' under s 304(a) of the Penal Code read together with s 34 of the same Code for causing injury to one Raja Mogan a/l Sellethurey ('deceased') resulting in his death on 6 September 2001 at No F–1, Ladang Merbau, Jeram, Kuala Selangor.

[11] The complainant in this case was the father of the deceased *Sellethurey a/l Retnam* ('SP2') who testified that on the evening of 5 September 2001, he and his family members including the deceased spent time together watching television ('tv') in the living room. By 12.30am on 6 September 2001, SP2 went to his room to sleep while the deceased, his brother and a cousin brother slept in the living room.

[12] At about 4.30am on 6 September 2001, the daughter of SP2, *Parvathy a/p Sellethurey* woke SP2 up and asked him to have a look at the deceased's condition in the living room.

[13] SP2 went to the living room and found the deceased lying on the mattress covered in blood. SP2 found slash wounds on the deceased's neck.

[14] On the night of the incident, the cousin brother, *Krishnan a/l Chandran* ('SP3') who slept beside the deceased was awaken when he felt someone stepped on his leg. Then he saw the first respondent, known to him as *Kannan*, running towards the kitchen while holding a 'parang'.

[15] SP3 then turned to look at the deceased and found him covered in blood. SP3 woke SP2's daughter up to tell her about the incident. She in turn woke SP2 up and the whole family.

[16] SP2 lodged a police report the same morning at the *Balai Polis Jeram* about the incident. The police report number is *1436/2001*.

[17] A post-mortem was done on the deceased on 7 September 2001 at 9.30am by *Dr Nurliza bte Abdullah* ('SP4'). It revealed the deceased's various injuries on the head, chin and neck.

[18] SP4 testified that *there was a deep slash wound* extending from right side of chin, diagonally across the lower right side of the deceased's face and slicing the lower part of the left earlobe up to the right posterolateral aspect of upper neck. *This wound had also sliced completely the right body of mandible, related masseter muscle and right rami of mandible*. In association, part of the cervical nerve and cervical vertebrae *were also severed* with associated contusions of the vascular structures. Over the right upper chest, there was a linear superficial abrasion and over the right clavicular region of upper trunk anteriorly, there was a superficial stab wound.

[19] SP4 came to the conclusion that the cause of death was *fatal deep slash wound to the face and neck*.

[20] *SP4 testified that the slash wounds were consistent with injuries caused by a heavy and sharp object like a 'parang, pedang or kapak'*.

THE RESPONDENTS CONTENTION

[21] Learned counsel for both respondents, Mr SS Seelan submitted that the power to sentence is discretionary and this court should be slow to interfere unless there is manifest error or unauthorised consideration had been taken into account.

[22] It was the submission of learned counsel that the learned judicial commissioner had taken all the factors and facts into consideration and compared this instant case with other cases of similar facts.

[23] On the aims of sentencing learned counsel brought to our attention the case of *R v Sargeant* (1974) 60 Cr App R 74 where he highlighted to us what Lawton LJ said at p 77 viz:

> Those classical principles are summed up in four words, retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles to mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing.

The other part of what Lawton LJ said on the aims of sentencing, which was left out by learned counsel, is in our view relevant and we therefore quote it below:

> I will start with retribution. The Old Testament concept of an eye for an eye and tooth for tooth no longer plays any part in our criminal law. There is, however, another aspect of retribution which is frequently overlooked: it is that society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass. The courts do not have to reflect public opinion. On the other hand courts must not disregard it. Perhaps the main duty of the court is to lead public opinion.

This case was approved by the Malaysian Federal Court in *Public Prosecutor v Dato' Waad bin Mansor* [2005] 2 MLJ 101. It was therefore contended that the learned judicial commissioner had taken into account the rehabilitative nature of the sentence.

[24] It was particularly emphasised by learned counsel that although five witnesses had given evidence, the material witness was SP4 Dr Nurliza bte Abdullah.

[25] There was also the guilty plea made by both respondents and not only does it save court's time but the judicial commissioner had exercised his discretion correctly.

[26] The learned judicial commissioner had also followed the established judicial principles in taking into account public interest, plea of guilt, mitigation factor, past record, age of the respondents and the past trend on sentence imposed on similar cases.

[27] The learned judicial commissioner observed from the notes of proceedings that the prosecution faced difficulty in securing the anticipated testimony of SP5 Jayakumar a/l Subramaniam.

[28] As such, learned counsel for the respondents prays for the appeal to be dismissed and the sentence of ten years as imposed by the learned judicial commissioner should be maintained.

OBSERVATIONS BY THIS COURT

[29] There was no plea of guilt made by the respondents on the first available opportunity. As could be observed, the trial went on after it was commenced on 27 September 2004 although they were first brought before the High Court on 6 October 2003 when they were charged under s 302 of the Penal Code. The respondents pleaded not guilty.

[30] Five witnesses have given their testimony before Justice Muhamad Ideres J before the learned judge was transferred to Kota Bahru, Kelantan.

[31] The case was adjourned to 26 September 2005 but on the appointed date it was adjourned to 18 October 2005 while waiting for the directive from the Right Honourable the Chief Judge (Malaya) as to whether Justice Muhamad Ideres should continue with the hearing or another High Court judge should be appointed to continue with the hearing under the provision of s 20 of the Courts of Judicature Act 1964. A B

[32] On 14 November 2005, a judicial commissioner was directed to continue with the hearing of this case. The court was then notified that the respondents directed their counsel to make a representation to the chambers of the attorney general to reduce the charge. A new date of 7 February 2006 was fixed to hear the case. C

[33] However, on 7 February 2006 when the deputy public prosecutor was ready with an alternative charge, both respondents asked for time to consider the same. A new mention date was fixed on 16 February 2006. D

[34] On 16 February 2006 however, *learned counsel for the respondents informed the High Court that it was the instruction of the respondents to continue with the original charge*. A new date from 17–19 May 2006 was fixed to continue with the hearing. E

[35] On 17 May 2006, both respondents changed their stand and decided to plead guilty on the alternative charge under s 304(a) of the Penal Code read together with s 34 of the same Code. F

[36] From the above, it is obvious that the dilatory attitude of the respondents did not contribute to the expeditious disposal of this case. One wonders if the above could be considered as having saved the court's time for if a plea of guilty is made too late in the trial it may also cease to have mitigating effect, see *Public Prosecutor v Dato' Nallakaruppan Solaimalai* [1999] 2 CLJ 596. G

Now we shall consider the grounds of appeal as postulated by the learned deputy. H

GROUNDS OF APPEAL

[37] *The learned judicial commissioner erred in not giving due consideration to the seriousness of the injuries inflicted and the circumstances in which the death was caused.* I

It would appear that the learned judicial commissioner took a simplistic approach to a very serious and vicious crime committed in this case when he said at p 116 of the appeal record:

Di dalam kes ini, berdasarkan fakta kes, jelas kedua-dua tertuduh bukanlah bertindak di atas 'sudden provocation' apabila pergaduhan yang dikatakan di antara si mati dengan mereka berdua, berlaku beberapa hari sebelumnya. Namun, walau apapun jenis kecederaan yang disebabkan oleh kedua-dua tertuduh yang menyebabkan kematian pada si mati iaitu sama ada satu atau 'multiple' dan walau berapa panjang pun hukuman yang dijatuhkan, tidak akan membawa si mati hidup kembali.

[38] The facts of this instant case reveal that the deceased was sleeping when the respondents caused the fatal injuries to him. The deceased was helpless and was not able to put up any defence to the vicious attacks by the respondents. There was no provocation or retaliation at the time of the commission of the offence. The facts show that the incident of the deceased running after the second respondent with a 'parang' happened one week prior to this gruesome murder. The act of the respondents coming into the deceased's home to cause injuries early in the morning while everyone was asleep was completely unprovoked and premeditated.

[39] The injuries inflicted on the deceased's head, chin and neck as outlined earlier at paras 15–18 were atrocious. It was testified by SP4 that:

> … there was a deep slash wound extending from the right side of chin, diagonally across the lower right side of the deceased's face and slicing the lower part of the left earlobe up to the right posterolateral aspect of the upper neck. This wound had also sliced completely the right body of mandible, related masseter muscle and right rami of mandible …

[40] Clearly, the respondents have intended to cause the death of the deceased. The deceased was sleeping; he was unable to defend himself. Being only 19 years old at the time of the commission of the offence, the deceased was at the prime of his life. At his own home where he was supposed to be safe, his life was taken away. It was savage and barbarous. We are of the view that the learned judicial commissioner failed to give due consideration and failed to sufficiently appreciate these facts before sentencing the respondents. We feel that this is an occasion when the Court of Appeal is compelled to intervene when a sentence of only ten years was imposed. Society must be protected from these rancorous men. They have total disregard for the precious human life. We note further that there are an increasing number of serious bodily crimes being committed. All one need to do is to flip through the pages of the local tabloid one could read about the crimes committed to the young and old, to the innocent and otherwise. Public interest requires our intervention.

[41] In the case of *Public Prosecutor v Gunasekaran a/l Arjunan & Anor* [2006] 5 MLJ 527, the court gave due weight to the circumstances in which death was caused as seen at p 530:

> The facts of the case clearly show that both the accused intended to cause the death of the deceased, Balu a/l Subramaniam. The deceased was helpless and was not able to put up any defence to the vicious repeated stabs with the knife, exh P7, by the second accused. The deceased could not even run for his life because he was firmly restrained by the first accused …
>
> … The facts show that there was no provocation or retaliation from the deceased right from the time the first and second accused had met up with the deceased at a foot outlet for drinks and till the time the second accused lured the deceased on his motorcycle, together with the first accused, to a deserted spot of undergrowth near a electronic factory (Kilang SONY) at Jalan Tanjung Bandar Utama, Damansara, Petaling Jaya.

Here, a sentence of 20 years was imposed.

Whether 'discount' is an automatic rule when the respondents plead guilty.

In *Bachik bin Abdul Rahman v Public Prosecutor* [2004] 2 MLJ 534; [2004] 2 CLJ 572 at pp 542–543 (MLJ); pp 583–585 (CLJ) Augustine Paul JCA (as His Lordship then was), delivering the judgment of the court said:

> One of the principles in sentencing is that a convicted person should be given a discount for pleading guilty. A reduction of about one third of the sentence would otherwise have been imposed is normally given. *This, however, is not a strict rule and the court may, in the exercise of its discretion, refuse to grant any discount. The severity of the offence or the existence of a previous conviction may outweigh the mitigating effect of the guilty plea; so may the demands of public interest for a deterrent sentence as well as the absence of a good defence or of other mitigating factors. The guilty plea does not automatically entitle the convict to a lesser punishment.* (Emphasis added.)

[42] With respect, we thoroughly agree with the sentiments expressed above. In this instant case, the severance of part of face of the deceased cannot be anything but gruesome and abominable.

[43] The learned judicial commissioner said in his judgment that the guilty plea and it being the first offence for both the respondents were the only mitigating factors in their favour and that the plea of mitigation failed to show any extenuating circumstances other than their family background, jobs and education. His Lordship at p 117 of the appeal record said:

> Berdasarkan faktor-faktor di atas, dan mengambilkira 1/3 diskaun kepada trend hukuman lalu iaitu 10 hingga 15 tahun penjara untuk kes-kes sebegini, saya dengan ini mensabitkan dan menjatuhkan hukuman penjara selama 10 tahun ke atas setiap seorang tertuduh berkuatkuasa dari tarikh tangkap.

A [44] It seems to us that the learned judicial commissioner may be of the erroneous pedantic view that there is this automatic rule that an offender will be given 1/3 discount upon pleading guilty. We do not think so. Courts must give due consideration to the facts of each particular case before sentencing. The relevant peculiar fact of this case is that the deceased was attacked while B he was sleeping. He was not even aware of what was happening to him. The attack was nothing less than premeditated with no element of provocation on the night of the incident.

C [45] No one who has killed an innocent person can expect upon conviction to be dealt with other than with utmost severity. Unless there are mitigating circumstances, they can expect to be sentenced or punished with the severest allowed by law.

D [46] While on this subject of 'guilty plea', we would like to associate ourselves to what was said by the learned judge in *Public Prosecutor v Gunasekaran a/l Arjunan & Anor* at p 531. We will quote the relevant text in extenso:

> E A plea of guilty does not automatically take away the discretion of any court to impose the maximum sentence provided for the said offence under the law. The accused and counsel should not delude themselves into thinking that a plea of guilty entitles an offender, a legal right to a sentence lesser than the maximum. Public interest is paramount and violent crimes affecting the human body resulting in death committed with a degree of premeditation, without any cause by the F deceased to have such a fate fall upon him, must be met with the severest punishment provided by the law.
>
> The courts of justice are not market places. The word 'discount', in relation to sentences, upon a plea of guilty, should not be used indiscriminately; as it gives the impression that the accused can 'bargain' over his sentence, as one bargains over a price at a market place. The threat of inconvenience to the court by a prolonged G trial and expense, in the event the court does not accede to pass a particular sentence or a lesser sentence than the maximum, upon a plea of guilty, should never prevail. The appropriate sentence in every case, whether the accused had pleaded guilty or otherwise, must be determined entirely on the peculiar facts of the case, after taking into consideration public interest, as paramount, at all times, H bearing in mind current needs and demands of state, society, and individuals for realistic punishment and rehabilitation of offenders who have no respect for the law or human life.

TREND OF SENTENCING

I [47] It would appear to us that the trend of sentencing for offences of almost similar nature varies from 12 years to 20 years. In *Vinaga Moorthy a/l Gopal v Public Prosecutor* [2003] 2 MLJ 87, the appellant was charged, convicted and sentenced for an offence under s 304 of the Penal Code and

was sentenced to 12 years imprisonment. The appellant appealed against sentence alleging that it was manifestly excessive. The appeal was dismissed. In *Pendakwa Raya lwn Ooi Kwang Lai* [2000] 6 MLJ 622, the accused was charged under s 304(a) and had pleaded guilty. He was sentenced to 15 years imprisonment. In *Public Prosecutor v Gunasekaran a/l Arjunan & Anor* [2006] 5 MLJ 527, the first and second accused were originally charged for the offence of murder under s 302 of the Penal Code read together with s 34 of the said Code, in causing the death of one Balu a/l Subramaniam. Both the accused claimed trial to the said charge. Not dissimilar to this instant case, the prosecution tendered an alternative charge under s 304(a) of the Penal Code and both the accused pleaded guilty to the said charge. Both accused were convicted and sentenced to 20 years' imprisonment.

[48] There are not many cases where courts have allowed an appeal by the public prosecutor against the inadequacy of the sentence imposed on the accused person. Given the circumstances of this case, it is our unanimous view that the Court of Appeal is compelled to intervene.

[49] For the reasons already given, we allow the appeal and set aside the sentence of ten years imprisonment handed down by the learned judicial commissioner and in place substitute it with a sentence of 17 years from the dates of their respective arrests of the two respondents.

Appeal allowed.

Reported by Kanesh Sundrum